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No. 02-371

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In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF VIRGINIA

BRIEF OF *AMICI CURIAE* CITY OF RICHMOND AND RICHMOND REDEVELOPMENT AND HOUSING AUTHORITY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST

Pursuant to Rule 37(2)(b) of the Rules of this Court, the City of Richmond and the Richmond Redevelopment and Housing Authority ("RRHA") respectfully move this Court for leave to file the attached brief *amicus curiae* urging that the Commonwealth of Virginia's Petition for Writ of Certiorari in this case be granted, and that the Supreme Court of Virginia's decision in Hicks v. Commonwealth, 563 S.E.2d 674 (Va. 2002), be reversed. The consent of counsel for the petitioner has been obtained. The consent of counsel for the respondent was sought, but withheld.

Richmond is the capital and fourth largest city in the Commonwealth of Virginia. Through the ongoing efforts of City Council and various departments and agencies, the City of Richmond works to provide for, and improve, the security and well-being of the almost 200,000 citizens living within its boundaries. Pursuant to § 2.04 of its Charter, the City of Richmond has the "power to adopt ordinances . . . for the preservation of the safety, health, peace, good order . . . [and] welfare of its inhabitants . . . ." Section 2.03(a) of this Charter specifically authorizes it to close public streets, and Va. Code Ann. § 15.2-2006 confers the additional ability for the City to alter or vacate public rights-of-way either upon the motion of City Council or the application of a person.

Richmond City Ordinance No. 97-181-197, which closed and privatized certain interior streets in the Whitcomb Court housing development so that the City's right and title in these streets could later be deeded over to RRHA, was adopted by Richmond City Council under the authority duly granted by City Charter §§ 2.03 and 2.04, and Va. Code Ann. § 15.2-2006. This street privatization effort directly led to the implementation of the RRHA trespass-barment policy that was erroneously stricken below as being overbroad and

violative of the First Amendment of the Constitution of the United States.

Created by Richmond City Council in 1940, RRHA is the largest public housing authority in the Commonwealth of Virginia. Its mission includes the provision of quality and affordable housing to low- and moderate-income tenants, the promotion of their self-sufficiency and economic betterment, the revitalization and elimination of blighted areas within the City, and the prudent oversight of growth and conservation programs designed to improve the overall quality of life in urban neighborhoods and environments.

Through an array of programs and in collaboration with the City of Richmond, the Commonwealth of Virginia, and other interested parties, RRHA actively seeks on a daily basis to prevent violence and criminal activity in its various communities, promote safe and secure dwellings and living conditions, and provide opportunities in which law-abiding tenants can empower themselves and realize their economic and educational potentials, as well as their dreams of home ownership.

In recent years, RRHA has won regional and national awards for the innovative measures that it has undertaken to advance these worthy objectives. Its diverse programs have achieved public recognition and prominence. They serve as models that public housing agencies across the country have studied and implemented. The United States Department of Housing and Urban Development has consistently labeled RRHA a "recognized performer" based upon standards that RRHA has set and surpassed both for itself and for others.

RRHA's housing operations cover sixteen housing developments for low-income families, nine developments for low-income elderly and the disabled, and scattered-site single-family homes and special housing units throughout the City of Richmond. Through its approximately 350 employees, RRHA manages over 4,000 public housing units in the City and provides subsidized housing in over 2,700 of these units. In all, RRHA serves approximately 12,000 public housing residents, and its programs directly serve and benefit over 33,000 Richmonders.

RRHA, in conjunction with City officials, formulated the trespass-barment policy for its communities as part of an ongoing front-line effort to rid public housing neighborhoods of criminal activity (often violent and drug-related) that is all too frequently committed by non-tenants and non-residents with no lawful purpose for being present on RRHA property.

The attached brief *amicus curiae* that RRHA and the City of Richmond seek to file explains the origin of RRHA's trespass-barment policy. It demonstrates that this policy, in conjunction with other law enforcement programs, lowered the incidence of violent and non-violent crime in Whitcomb Court without chilling free speech or impeding the exercise of other First Amendment rights and freedoms. This policy, as well as the City ordinance that preceded its realization, is a vital element of collaborative crime prevention and crime reduction efforts in Richmond on the local, state, and federal levels. These two directives must be viewed in this context.

Although a majority of the Supreme Court of Virginia held that the trespass-barment policy was unconstitutionally overbroad, its final order vacated the intermediate appellate court's *en banc* discussion about whether the privatized streets of Whitcomb Court constituted a public forum. This Court has repeatedly confirmed through its holdings that a public forum analysis is central and mandatory to any finding of overbreadth. The refusal to engage in such an analysis below not only conflicts with the well-settled decisions of this Court (and other state and federal courts across the United States), but also reflects such

a departure from the accepted and usual course of judicial proceedings that the exercise of this Court's supervisory power is required to resolve the conflict created on this important issue of federal law.

The Commonwealth's Petition for Writ of Certiorari cogently discusses the need for clarifying the law of standing for overbreadth challenges, as well as the equally compelling need to resolve the already-existing split in federal and state authority that has been perceptibly widened by the decision below. The attached brief *amicus curiae* complements that analysis by discussing additional relevant matter that will be of help in this Court's decision whether to grant a writ in this case.

WHEREFORE the City of Richmond and the RRHA respectfully request that this Court grant them leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari.

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INTRODUCTION AND STATEMENT OF ADDITIONAL RELEVANT FACTS[1]

During the twelve-year period preceding the adoption of City Ordinance No. 97-181-197, and the development of RRHA's trespass-barment policy, Richmond was notoriously known as "the murder capital of Virginia"[2] and "one of the nation's murder capitals."[3]

The reasons underlying the creation of this "national Murder City image"[4] are amply confirmed by crime statistics published annually by the Federal Bureau of Investigation. In 1985, Richmond was ranked third among American cities for the number of homicides per 100,000 people.[5] The following year, "crack cocaine came to town and homicides increased sharply."[6] Between 1986 and 1997, Richmond's per capita homicide rate ranked perennially among the top ten in the nation, fluctuating between seventh place (1986)[7] and second place (1994 and 1997).[8] Its rate was consistently

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, has made any monetary contribution to the preparation or submission of this brief.

[2] Gary Robertson, For the Media: 'A Feeding Frenzy'; Reaction Soon Overshadowed Event, Richmond Times-Dispatch, June 21, 1998, at A-1.

[3] Carrie Johnson, Crime That's Often Lost; No Easy Definitions or Answers to Rape, Richmond Times-Dispatch, Aug. 24, 1998, at A-1.

[4] Mark Holmberg, Richmond on Top of Crime; 'It's a Phenomenal Turnaround,' Renaissance Executive Director Says, Richmond Times-Dispatch, Jan. 3, 2000, at B-1.

[5] Michael Martz, City Man's Death Sets Homicide Record, Richmond News Leader, Dec. 30, 1989, at 1.

[6] Mark Holmberg and Jim Mason, 10 Slayings in City in First 15 Days of '97 a Bloody Beginning, Jan. 16, 1997, at B-1.

[7] Martz, *supra* note 5.

[8] Gordon Hickey, FBI Numbers Confirm Trend; Richmond No. 2 in '94 Murder Rate, Richmond Times-Dispatch, May 22, 1995, at A1; Gordon Hickey, Violent Crimes Drop in City; Clearance Rate Up; Police Work Praised, Richmond Times-Dispatch, Apr. 28, 1998, at A-1.

the highest in the Commonwealth of Virginia over this same period.[9]

Commentators and City residents have stated various rationales for Richmond's ranking, the most common being the increased prevalence and mix of drugs and guns on City streets.[10] One reporter observed that "locals tend to blame it mostly on drug-related killings, especially in and around the housing projects."[11]

Richmond's alarmingly high homicide rates attracted the attention of national public housing officials, prompting former Secretary of Housing and Urban Development Henry Cisneros to urge action so that "'public housing [in Richmond and elsewhere] is no longer a safe harbor for criminals.'"[12]

Federal agencies continued to assist Richmond with their law enforcement efforts. For example, HUD named the City in 1990 as one of twenty that would receive funds for a program designed to "seize the public housing leases of alleged drug dealers or people believed involved in the drug trade."[13] In 1994, HUD awarded RRHA a $1.1 million grant

[9] *See* Gordon Hickey, Gunshot Treatment Costs High, Richmond Times-Dispatch, Mar. 14, 1999, at A-6.

[10] Brian Kelley, City May Set Two Homicide Records, Richmond Times-Dispatch, Oct. 22, 1990, at A1.

[11] Ray McAllister, Using the Police Ball to Make a Statement, Richmond Times-Dispatch, Oct. 8, 1993, at B1. Unfortunately, there is evidence to support this perception. *See, e.g.*, Gordon Hickey, Homicides Found to Occur Mostly in Housing Projects, Richmond News Leader, Aug. 11, 1990, at 17 ("Although about 6 percent of Richmond's population lives in housing-project areas, about 41 percent of the city's homicides during the first half of 1990 were committed in them.").

[12] Editorial, Gilpin's Heroes, Richmond Times-Dispatch, Feb. 18, 1994, at A14.

[13] Randolph Goode & Peter Hardin, Drug Eviction Notices Are Filed in Richmond, Richmond News Leader, June 26, 1990, at 1.

for increased police presence in eight public housing projects plagued by drug trafficking.[14] And in 1995, Richmond was given one of two federal grants awarded by the United States Bureau of Justice Assistance "to develop and implement a strategy to reduce homicides in the city and to increase the number of cases solved . . . ."[15]

Despite the increased resources that were deployed to combat these evils, violent crime and drug-related activities continued in RRHA-managed neighborhoods and other parts of the City. Indeed, "[t]he first six months of 1994 was the deadliest half-year in Richmond's history, as 78 people were shot, stabbed, bludgeoned or scalded to death by killers as young as 14 years old."[16] These killings were "fueled largely by arguments, drugs, alcohol and greed."[17] In fact, the "carnage on some of Richmond's streets" was so appalling that the Chairman of the City School Board called for the declaration of martial law, stating: "'Bring in the National Guard, federal troops, whatever we need to get our community back . . . . Ladies and gentlemen, the house is on fire.'"[18]

This tragic situation posed serious consequences for the many law-abiding residents and tenants of public housing developments. Recognizing their plight, RRHA and the City decided that they would work together to convert Richmond

[14] Area/State, Grant to Provide Officers, Richmond Times-Dispatch, Oct. 9, 1994, at B9.

[15] Dorine Bethea, City Gets $350,000 Grant to Plan Strategy for Curbing Homicides, Richmond Times-Dispatch, Dec. 13, 1995, at B-1.

[16] Mark Holmberg, First Half of '94 Sets Homicide-Rate Record, Richmond Times-Dispatch, July 5, 1994, at A1.

[17] *Id.*

[18] Gordon Hickey, 'Full Alert' Sounded for Troubled Areas, Richmond Times-Dispatch, Aug. 11, 1994, at A1.

from "one of the nation's bloodiest cities into a model of crime-fighting prowess."[19]

The Development of the Trespass-Barment Policy

Understanding that the majority of crimes occurring in public housing were committed by outsiders[20] – especially by persons who had no legitimate business or social purpose for being in its developments – RRHA implemented a no-trespassing policy in the Gilpin Court[21] neighborhood in 1990. It was designed to promote the official enforcement of existing state law, *i.e.*, Va. Code Ann. § 18.2-119 ("Trespass after having been forbidden to do so").

In November 1990, RRHA issued a letter to residents advising them of this "No Trespassing" policy and inviting public questions and comments. Shortly thereafter, workers began to post 250 "No Trespassing" signs throughout Gilpin Court,[22] and RRHA released the following bulletin:

Trespassers Beware!!!

> Beginning November 20, 1990, [RRHA], in conjunction with the Richmond City Police, will begin prosecuting all trespassers in the Gilpin Court public housing community . . . .
>
> Once the new No Trespassing Policy is implemented, all guests of RRHA's Gilpin residents must have a specific destination and will not be allowed to loiter on RRHA properties. Additionally, residents may be asked to verify if an individual is in fact their guest.
>
> Our No Trespassing Policy was proposed by the Gilpin Safe Neighborhood Program Committee, which includes RRHA residents, RRHA staff, community leaders, and the Richmond City Police. We know that the majority of criminal activity that occurs in public housing is conducted by non-residents. This policy, which is part of our continuing effort to make our properties safe and crime-free, will allow residents to control who visits their community.

(emphasis in original) (internal quotation marks and citation omitted). The "No Trespassing" policy continued throughout the mid-1990s and was gradually extended into other RRHA public housing developments.

Although this policy yielded commendable results,[23] it had only limited success because the sidewalks and streets of RRHA housing projects remained public property. Thus, if police officers saw unauthorized persons trespassing upon

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[19] Carrie Johnson & Gordon Hickey, Back from the Brink; Deaths Dip as City Takes Blight Out of Crime, Richmond Times-Dispatch, Oct. 11, 1999, at A-1.

[20] *See* Teresa Lemons, No-Trespassing Policy to Begin in Gilpin Court, Richmond News Leader, Nov. 9, 1990, at 17.

[21] Gilpin Court is the City's oldest public housing neighborhood, and is also the largest such development on the East Coast between Baltimore and Atlanta. Mark Holmberg, Seeing the Light; Inner City Glows in Glitter of the Holiday Season, Richmond Times-Dispatch, Dec. 20, 1998, at B-1; Michael Paul Williams, 39 Take Step in Direction of Success; Welfare-to-Work Program is Hailed, Richmond Times-Dispatch, June 7, 1996, at B-2.

[22] Brian Kelley, Gilpin Court Trespassing Signs Go Up, Richmond Times-Dispatch, Nov. 9, 1990, at B4.

[23] *See* Teresa Lemons, Public Housing Gentry's Calling Now, Richmond News Leader, Feb. 28, 1992, at 19 (discussing the Gilpin Court program and observing that "[p]reliminary police statistics show violent crimes in public housing decreased 5 percent from 1990 to 1991").

RRHA-owned buildings and grounds, these intruders could avoid arrest and prosecution by simply stepping onto an adjacent street or sidewalk. More was needed in order for RRHA to protect the health, safety, and welfare of its tenants.

In a memorandum dated December 16, 1996, Gloria Rogers (Whitcomb Court housing manager) recommended a solution to her superiors – that the streets within that project be privatized. Street privatization promised to achieve the following benefits:

- Eliminating the sale of drugs from streets and sidewalks;
- Holding criminals and those who aid them accountable for unlawful acts;
- Cutting crime in public housing;
- Abolishing open air drug markets; and
- Reducing trash on streets and sidewalks.

Three days later, RRHA officials indicated City police and civic leaders at a public safety meeting that RRHA gradually wanted to "close all public right-of-ways to public use and travel within all of their public housing communities." A formal request followed in February 1997.

The streets of Whitcomb Court were among those that were selected first for privatization. This designation was not accidental. Long known as "one of the city's most violent and troubled housing projects,"[24] Whitcomb Court had been a

[24] Mark Holmberg, Where the Past Blights the Present, Richmond Times-Dispatch, Aug. 30, 1998, at B1.

popular venue for open air drug dealing.[25] One local reporter observed in 1994 that Whitcomb Court was "a neighborhood where crack addicts snap off car antennas to fashion makeshift pipes, a wasteland of stark buildings, trash and weed-and-dirt yards whose only fetching quality is the sparkle of shattered glass under street lights."[26]

In Whitcomb Court, the 2300 block of Bethel Street was especially violent – a block where people were murdered while children played nearby,[27] where major heroin and crack cocaine suppliers set up their shops[28] and dealt drugs within 1,000 feet of an elementary school,[29] where a teenager was shot in the head while simply sitting in a car,[30] and where police might find fifty people – several of them screaming – surrounding a fatality, but no witnesses.[31] Unsurprisingly, the 2300 block of Bethel Street was selected for privatization.

Officials from RRHA and the City further discussed privatization efforts in March 1997. RRHA indicated at that time that City police had "expressed support" for its proposed policy. It stated that "[t]he Police Department is expected to be the primary enforcement unit that will issue summons

[25] Battino Batts Jr., Police Unit is Forcing the Issue: Strike Force Hits Drugs, Arms, Richmond Times-Dispatch, May 2, 1993, at B1.
[26] William Ruberry, Wrestling Richmond's Bad Guys, Richmond Times-Dispatch, May 2, 1994, at A1.
[27] Mark Holmberg, Crime Has Cut a Path Through Her Family: Grandmother Wonders Why It Went So Wrong, Richmond Times-Dispatch, Mar. 11, 1994, at A1.
[28] Alan Cooper, Murder, Drug Dealing Draw 2 Life Terms, Richmond Times-Dispatch, Apr. 25, 1996, at B3.
[29] Randolph Goode, Six Indicted in Whitcomb Court Case, Richmond Times-Dispatch, June 24, 1995, at B1.
[30] Area/State, Two Hurt in Separate Shootings, Richmond Times-Dispatch, Jan. 19, 1993, at B3.
[31] Area/State, South Side Man Killed; Woman, 18, Shot in Head, Richmond Times-Dispatch, July 19, 1990, at B5.

[sic] and arrest persons for violating trespassing rules and other infractions," and that

> [t]he primary focus in [law] enforcement will be to deter street level drug dealing, hanging out on street corners by non-residents and to discourage non-residents from entering public housing communities, except for legitimate social or business reasons.

Later in March, the City's Director of Public Works advised City Council that street privatization should proceed.

In a letter dated April 11, 1997, RRHA's Director of Public Housing verified that if privatization were approved, "RRHA's only intent as owner of the streets, will be to help control . . . traffic that frequents our neighborhoods for illegal or other disruptive purposes." Although residents and school buses could "travel to and from Whitcomb Court as they do now," "the streets [and sidewalks] will clearly be marked as RRHA-owned private property."

The City Planning Commission unanimously voted to recommend approval of the closing of public right-of-ways in Whitcomb Court following a public hearing in May 1997. On May 12, 1997, City Council adopted Ordinance No. 97-143-124, which provided for the privatization of streets and sidewalks in Whitcomb Court. This ordinance was amended on June 23, 1997 by Ordinance No. 97-181-197, so that City police could enforce traffic laws on the privatized streets.

The City renounced its legal interest in the streets and sidewalks of Whitcomb Court by letter dated July 23, 1997. Two days later, the City deeded these thoroughfares over to RRHA, which subsequently authorized City police to enforce state criminal trespass laws on all of its properties.

RRHA erected "No Trespassing" signs on the streets and sidewalks of Whitcomb Court, so that people would know that Whitcomb Court was private property, and that their unauthorized presence there would subject them to arrest.

The Success and Untimely Demise of the Trespass-Barment Policy

Statistical evidence compiled by the Crime Analysis Unit of the Richmond Police Department demonstrates that overall monthly crime rates declined in Whitcomb Court after the trespass-barment policy was implemented.[32]

01/01/96-07/31/97 (17 months before policy effected) [No. per month]	08/01/97-12/31/98 (19 months after policy effected) [No. per month]	01/01/99-06/05/02 (last 42 months policy in effect) [No. per month]
Violent: 2.4	2.1	1.9
Property: 5.6	4.1	4.2
Total: 8.0	6.2	6.1

Under this policy, Kevin Lamont Hicks was arrested twice in 1998 for trespassing in Whitcomb Court. Hicks was barred from Whitcomb Court (and all other RRHA property) in April 1998. He signed the written barment notice that was served on him. That notice stated that if he trespassed on RRHA property in the future, he would be subject to arrest. In January 1999, Hicks was arrested for trespassing on the sidewalk of the 2300 block of Bethel Street by a policeman who knew about Hicks' barment from Whitcomb Court. Hicks was convicted. That conviction was overturned on overbreadth grounds by a majority of the Supreme Court of

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[32] Due to a systems error, violent crimes and property offenses occurring on Deforrest Street during the period 01/01/00-06/05/02 are not included in the third column.

Virginia, which affirmed a sharply-divided *en banc* decision of the Court of Appeals of Virginia.

SUMMARY OF ARGUMENT

The overbreadth analysis conducted by a majority of the Supreme Court of Virginia conflicts with the well-settled jurisprudence of this Court in three principal areas in addition to those set forth in the Petition for Appeal.

First, this Court has held that an individual lacks standing to make an overbreadth challenge if his actions fall within the core of the conduct being regulated. Here, RRHA adopted a trespass-barment policy to reduce and eliminate drug-related and other criminal activity in Richmond public housing, and to prevent outsiders from unlawfully trespassing on RRHA-owned private property after being forbidden to do so. Hicks was twice arrested for trespassing in Whitcomb Court, and a third time for causing property damage in Whitcomb Court. On each occasion, he was found guilty, but his sentence was suspended on the condition that he keep the peace for three years. RRHA officials served Hicks in April 1998 a written notice barring him from entering onto any RRHA properties, including Whitcomb Court. This notice informed Hicks that if he was seen or caught on RRHA property in the future, he would be subject to arrest. Hicks acknowledged his receipt of this notice in writing before multiple witnesses. Because Hicks' conduct falls squarely within that circumscribed by the trespass-barment policy, he lacked standing to raise an overbreadth argument, and the Supreme Court of Virginia erred in striking down that policy solely on that basis.

Second, this Court has repeatedly held that whenever a policy restricts conduct, not speech, that policy may not be stricken as overbroad and violative of the First Amendment unless the overbreadth is both "real" and "substantial as well,

judged in relation to the [policy's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Gloria Rogers testified that the trespass-barment policy was adopted to address tenant concerns about criminal acts committed by outsiders in public housing. The policy was not directed at limiting First Amendment activities, and there was no evidence that it had diminished or even chilled protected speech or conduct. When Hicks was arrested for trespassing in Whitcomb Court after RRHA had validly barred him from coming into that community, he stated that he was delivering diapers to one of his children. This conduct was not entitled to any First Amendment protection as the dissent rightly discerned, citing controlling authority by this Court. Hicks, 563 S.E.2d at 683-85 (Kinser and Lemons, JJ., dissenting) (citing *inter alia* Broadrick, 413 U.S. at 615).

Finally, assuming *arguendo* that the trespass-barment policy encroached upon protected speech, this Court has held in United States v. Kokinda, 497 U.S. 720 (1990), and other courts have agreed, that the government can adopt content-neutral restrictions on speech in a non-public forum so long as those limitations are reasonable. Under these cases, it was incumbent upon the majority below to determine whether the now-privatized streets and sidewalks of Whitcomb Court are public or non-public fora.[33] Absent this analysis, its finding of overbreadth is doctrinally unsound and, more importantly, squarely in conflict with relevant decisions by this Court and by other state and federal appellate courts.

The constitutional issues framed by the Petition and this brief *amicus curiae* have routinely attracted this Court's attention and compelled it to exercise jurisdiction to resolve

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[33] Because Hicks was "not engaged in [any First Amendment] speech or expressive association" at the time of his post-barment arrest, the dissent deemed it unnecessary to engage in a traditional forum analysis. Hicks, 563 S.E.2d at 684 (Kinser and Lemons, JJ., dissenting).

their inherent complexities. *See, e.g.*, Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 122 S. Ct. 2080 (2002) (striking down local ordinance prohibiting door-to-door canvassing on First Amendment grounds); Department of Housing and Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002) (concluding that a public housing authority could hold tenants strictly liable for the drug-related criminal acts of their guests and seek an eviction on that basis to protect other residents). This case reflects the conflict between Rucker and Watchtower, where a housing authority's and City's law enforcement interests collide (in the view of a majority of the Supreme Court of Virginia) with the First Amendment rights to petition and freedom of speech. This Court should grant a writ to decide the clash between these weighty and important constitutional issues.

ARGUMENT

I. This Court should grant a writ to ensure that only those whose rights to speech are possibly silenced or chilled have standing to claim overbreadth.

The majority below ruled that Hicks "was entitled to challenge the validity of his conviction on the basis that the Housing Authority's practices and procedures contravened his constitutional rights." Hicks, 563 S.E.2d at 677. Rather than analyze the nature or quality of his conduct at the time of his arrest, it merely observed that decisions from both this Court and it have "permitted criminal defendants to assert constitutional challenges to various ordinances in criminal prosecutions." *Id.* (citing *inter alia* Lovell v. City of Griffin, 303 U.S. 444 (1938). This stripped-down view of standing is incorrect, setting a conflicting precedent on an important issue of federal law that should not be allowed to stand.

This Court has held that whenever a defendant's conduct "falls within the core of the regulation" at issue, he

"lacks standing to contend that the regulation is vague and overbroad." Haig v. Agee, 453 U.S. 280, 309 n.61 (1981) (citing Parker v. Levy, 417 U.S. 733, 755-56 (1974)). Lower federal courts, and state appellate courts, have followed this controlling principle, as they must. *See, e.g.*, Brecheisen v. Mondragon, 833 F.2d 238, 243 (10th Cir. 1987), *cert. denied*, 485 U.S. 1011 (1988) (concluding that "'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court'") (quoting Broadrick, 413 U.S. at 610); Wells v. State, 351 N.E.2d 43, 47 (Ind. Ct. App. 1976) ("[W]here conduct rather than speech is involved and the appellant stands at the hard core of permissible regulation, his standing to assert facial overbreadth will not be recognized.") (citing Broadrick).

In Broadrick, three public servants challenged as vague and overbroad the portion of a state act that prohibited governmental employees from *inter alia* soliciting political contributions, running for paid public office, and engaging in other partisan activity. 413 U.S. at 602-06. Both arguments failed. First, this Court deemed the vagueness claim "all but frivolous" because the state statute was written "'in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with . . . .'" *Id.* at 607-08 (citation omitted). Second, the act was not overbroad because it regulated "political activity in an even-handed and neutral manner." *Id.* at 616. This Court stated that judicial concern over an allegedly overbroad standard "attenuates as the . . . behavior . . . moves from 'pure speech' toward conduct . . . that . . . – even if expressive – falls within the scope of otherwise valid criminal laws . . . ." *Id.* at 615. Notably, this Court further explained that although laws

> if too broadly worded, may deter protected speech to some unknown extent, there

> comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id. (citation omitted).

Here, that "point" was reached and clearly exceeded. As noted *supra*, Hicks had been convicted on multiple occasions for trespassing in Whitcomb Court. He was ultimately barred from that community, and every other RRHA neighborhood. Moreover, the general district court judge who had first tried Hicks had ordered Hicks in open court not to return to RRHA property. Rather than heed these directives, Hicks proceeded to trespass again in Whitcomb Court. When he was stopped and questioned by a policeman who knew about Hicks' barment, he stated that he was delivering diapers, not engaging in speech.

Hick's conduct is clearly not subject to any First Amendment protection. RRHA's trespass-barment policy was designed to help eliminate crime and drug-related activity in public housing – an interest that motivated this Court last term in Rucker to hold that a public housing authority has "the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known of [such] activity." 122 S. Ct. at 1236.

Because the trespass-barment policy at issue was also intended to prevent outsiders like Hicks from trespassing in RRHA neighborhoods, which constitute private property, his conduct unequivocally fell within its scope of regulation, and his overbreadth challenge should have been disallowed *ab initio* for lack of standing.

II. This Court should grant a writ because there was no finding on the record below that any alleged overbreadth was real or substantial in light of the trespass-barment policy's legitimate sweep.

The majority below limited its review to the "narrow issue" of whether "a redevelopment and housing authority's trespass policy is overly broad . . . ." Hicks, 563 S.E.2d at 675. Although it acknowledged the direction from Broadrick that "the overbreadth doctrine is 'strong medicine,'" and that it "should be employed 'sparingly and only as a last resort,'" the majority bypassed Broadrick on its principally applicable point through its refusal to accept that the trespass-barment policy targets conduct, not speech. *Id.* at 678.

In Broadrick, this Court established the standard that "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. This standard has been cited as bedrock law by every federal circuit court of appeals. New England Accessories Trade Ass'n, Inc. v. City of Nashua, 679 F.2d 1, 5 (1st Cir. 1982); Gormley v. Director, Conn. State Dep't of Probation, 632 F.2d 938, 942 (2d Cir.), *cert. denied*, 449 U.S. 1023 (1980); Rode v. Dellarciprete, 845 F.2d 1195, 1200 (3d Cir. 1988); Thorne v. Bailey, 846 F.2d 241, 244 (4th Cir.), *cert. denied*, 488 U.S. 984 (1988); Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 482 (5th Cir. 2002); Staley v. Jones, 239 F.3d 769, 785 (6th Cir. 2001); Paulos v. Breier, 507 F.2d 1383, 1386 n.6 (7th Cir. 1974); Otten v. Schicker, 655 F.2d 142, 145 (8th Cir. 1981); Roulette v. City of Seattle, 97 F.3d 300, 305 (9th Cir. 1996); Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Supervisors, 32 F.3d 1436, 1442 (10th Cir. 1994); Horton v. City of St. Augustine, 272 F.3d 1318, 1332 (11th Cir. 2001); Hastings v. Judicial

Conference of the United States, 829 F.2d 91, 106 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

This principle has similarly and routinely been cited by at least twenty-five state courts of last resort. *See, e.g.*, State v. Hookstra, 638 N.W.2d 829, 838 (Neb. 2002); Galloway v. State, 781 A.2d 851, 875 (Md. 2001), *cert. denied*, 122 S. Ct. 1547 (2002); State v. Cotton, 769 So. 2d 345, 356 (Fla. 2000); State v. Musser, 977 P.2d 131, 132-33 (Ariz. 1999); State v. Nye, 943 P.2d 96, 103 (Mont. 1997); Ino Ino, Inc. v. City of Believue, 937 P.2d 154, 172 (Wash. 1997), *cert. denied*, 522 U.S. 1077 (1998); United States v. Smith, 685 A.2d 380, 387 (D.C. 1996), *cert. denied*, 522 U.S. 856 (1997); State v. Brown, 648 So. 2d 872, 878 (La. 1995); Aguilar v. People, 886 P.2d 725, 727 (Colo. 1994); State v. Thiel, 515 N.W.2d 847, 853 (Wis.), *cert. denied*, 513 U.S. 878 (1994); State v. Todd, 468 N.W.2d 462, 466 (Iowa 1991); *In re* Appeal of Suspension of Huffer from Circleville High Sch., 546 N.E.2d 1308, 1313 (Ohio 1989); Cranston Teachers Alliance Local No. 1704 AFT v. Miele, 495 A.2d 233, 235 (R.I. 1985); Morrisette v. Dilworth, 452 N.E.2d 1222, 1224 (N.Y. 1983); People v. Holder, 451 N.E.2d 831, 834 (Ill. 1983); Spilotro v. State *ex rel.* Nev. Gaming Comm'n, 661 P.2d 467, 471 (Nev. 1983); Morris v. Municipal Court for the San Jose-Milpitas Judicial Dist. of Santa Clara County, 652 P.2d 51, 58 n.14 (Cal. 1982); Caby v. State, 287 S.E.2d 200, 202 (Ga. 1982); Woll v. Kelley, 297 N.W.2d 578, 593 (Mich. 1980); State v. Baysinger, 397 N.E.2d 580, 587 (Ind. 1979), *appeal dismissed sub nom.* Clark v. State, 446 U.S. 931 (1980); Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065, 1068-69 (Me. 1978); Commonwealth v. DeFrancesco, 393 A.2d 321, 330 (Pa. 1978); *In re* Banks, 244 S.E.2d 386, 391 (N.C. 1978); State v. Woodworth, 234 N.W.2d 243, 250 (N.D. 1975); State *ex rel.* Gonzales v. Manzagol, 531 P.2d 1203, 1207 (N.M. 1975).

The inescapable fact that the trespass-barment policy is directed at conduct, not speech, is easily confirmed by the history behind its adoption. For example, it has been reported in a published decision that "RRHA tenants are the victims of an extraordinarily high incidence of crime, much of which is connected to illegal drug traffic." Richmond Tenants Org., Inc. v. Richmond Redevelopment and Housing Auth., 751 F. Supp. 1204, 1207 (E.D. Va. 1990), *aff'd*, 1991 U.S. App. LEXIS 27694 (4th Cir. Nov. 8, 1991) (*per curiam*) (allowing lease changes, including a ban on gun ownership, on RRHA premises). As noted *supra*, RRHA devised and executed the trespass-barment policy to increase public safety, and lower criminal activity by unwelcome outsiders and trespassers, in its communities. The clear and present danger created by the violent conditions in Whitcomb Court and elsewhere justifies implementation of the policy. *See, e.g.*, Khademi v. South Orange County Community College Dist., 194 F. Supp. 2d 1011, 1026 (C.D. Cal. 2002) ("The state has a compelling interest in the enforcement of its criminal laws.") (citing Branzburg v. Hayes, 408 U.S. 665, 700-01 (1972)); National Paint & Coatings Ass'n v. City of Chicago, 803 F. Supp. 135, 143-44 (N.D. Ill. 1992) (discussing exercise of a city's police power to deter illegal activity and preserve property values).

In contrast to the policy's "plainly legitimate sweep," Broadrick, 413 U.S. at 615, the record displays no "real" or "substantial" concern that speech is being silenced. Gloria Rogers testified that she had never denied permission to anyone wishing to distribute flyers in RRHA developments. Hicks was not arrested for engaging in protected speech, but for trespassing post-barment in Whitcomb Court. During his criminal proceedings, Hicks offered no witnesses to establish that anyone had refused to come into Whitcomb Court for

fear of arrest or prosecution[34] under the policy. Simply stated, there was a complete failure by Hicks to offer evidence that the policy was chilling or prohibiting any protected, or arguably protected, speech.

"The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel." New York v. Ferber, 458 U.S. 747, 771 (1982). Because this is indeed "the paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications," the Petition for Appeal should be granted to correct the error below. *Id.* at 773.

III. This Court should grant a writ to decide whether privatized sidewalks and streets owned by a local housing authority constitute a non-public forum.

In its panel and *en banc* decisions below, the Court of Appeals of Virginia debated at length whether the privatized streets and sidewalks in Whitcomb Court are public or non-public fora under decisions by this Court. *Compare* Hicks v. Commonwealth, 535 S.E.2d 678, 683-84 (Va. Ct. App. 2000) (non-public fora), *with id.* at 685-88 (Coleman, J., concurring in part and dissenting in part) (public fora); Hicks v. Commonwealth, 548 S.E.2d 249, 253-55 (Va. Ct. App. 2001) (*en banc*) (non-public fora), *with id.* at 259-61 (Humphreys, Willis, Bray, Bumgardner, and Agee, JJ., dissenting) (public fora).

But the debate at the Supreme Court of Virginia was decidedly one-sided. While none of the justices conducted a forum analysis, the dissent **and even Hicks** recognized that

[34] Gloria Rogers testified that nobody is arrested until after being warned not to trespass on RRHA property. Her testimony was uncontested, and Hicks was admittedly warned before being barred and later arrested.

the Kokinda framework – *i.e.*, that "'the extent to which the Government can control access depends on the nature of the relevant forum'"[35] – controlled. Hicks, 563 S.E.2d at 684-85 (Kinser and Lemons, JJ., dissenting) ("The defendant agrees that this analytical framework applies in this case . . . .") (quotation at 684). Given this consensus, the majority's decision to sidestep this question and to strike down the trespass-barment policy based upon Gloria Rogers' allegedly "unfettered discretion [as] a government official" warrants further review by this Court. *Id.* at 681.

An excerpt from Rogers' testimony is included in the majority decision below. *Id.* at 680-81. But the testimony that immediately followed that colloquy was omitted.

> Q: Are there any particular guidelines . . . that you refer to determine whether or not any group or type of religion will be allowed to circulate [flyers or other materials]?
>
> A: Yes. I refer all those to community council and they meet with the board and the residents to decide, because there's so many residents and so many things, the City Council and housing management work out . . . .

Even in situations where Rogers was shown a church flyer, which she was used to seeing, she would often refer it to her immediate supervisor for approval.

It is apparent that RRHA installed a series of checks and balances to prevent content-based restrictions on speech from occurring. While these safeguards could arguably have been stronger, the constitutionality of the trespass-barment policy turns not upon the strength of these checks, but upon

[35] Kokinda, 497 U.S. at 726 (citation omitted).

their existence. Such policies have been held constitutional by several federal courts of appeals and state courts of last resort. (Pet. for Appeal at 22-25.) The conflict in authority generated by the majority decision below, coupled with the fact that this Court has not yet resolved this important issue of federal law, warrants the issuance of a writ here.

CONCLUSION

This Court "[f]or over 50 years . . . has invalidated restrictions on door-to-door canvassing and pamphleteering." Watchtower, 122 S. Ct. at 2086. But this Court also held 8-0 in Rucker that "local housing authorities . . . are in the best position to take account of . . . the degree to which the housing project suffers from 'rampant drug-related or violent crime," and to implement "'reasonable steps to prevent or mitigate the offending action.'" 122 S. Ct. at 1235 (citations omitted). This case amply demonstrates the conflict between these two holdings, and, as the Commonwealth describes it in its Petition, between government as sovereign and government as landlord. Whether the Watchtower rationale or the Rucker logic prevails is a decision that only this Court can properly (and finally) make.

RRHA's trespass-barment policy helped reduce crime in Whitcomb Court. It is a front-line policy in the war against drugs that is run by dedicated laypersons, not constitutional scholars. If a writ is not issued, and the Supreme Court of Virginia's decision is allowed to stand, many good works that have been accomplished in that neighborhood in the past four years will have been for naught. As crime levels again begin to increase,[36] this should not be allowed to occur.

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[36] *See* Michael Hardy, Crime Rate Up 2.3 Percent in VA; Reported Rise Reverses Decade of Steady Drops, Richmond Times-Dispatch, July 12, 2002, at B2.

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